UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION SIX

In the Matter of:

UNIFIRST CORPORATION,

Employer

and

ROBERT A. FUSILLO

Case No. 06-RD-097418

Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS, INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 1324-15

Union

BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO HEARING
OFFICER'S REPORT ON CHALLENGED BALLOT & OBJECTIONS TO ELECTION

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I. Introduction

UniFirst Corporation ("UniFirst" or "Employer") respectfully submits this Brief in support of the Employer's Exceptions To The Hearing Officer's Report On Challenged Ballot And Objections ("Report") issued on August 28, 2013.

II. Relevant Facts

The Employer's business principally involves the sale, rental, and cleaning of work garments and industrial textile products (i.e., shop towels, floor mats.) The Employer's production and maintenance employees, garage mechanics, and route delivery personnel are part of a wall-to-wall bargaining unit of approximately 145 employees represented for collective bargaining purposes by the Union. (Tr. @ 10:24 to 12:23; Employer's Ex. 1, Election Eligibility List.) On January 31, 2013 a decertification petition was filed in the above-captioned matter by a maintenance employee, Robert A. Fuscillo, ("Petitioner.") The processing of this RD petition by Region Six was delayed for nearly three months by an unmeritorious blocking charge. In mid-May, 2013, the parties established the terms of the election by stipulated agreement approved by the Regional Director.

From approximately mid-April to mid-June, 2013 the Employer held five "rounds" of meetings with production, maintenance, and mechanical ("P & M") employees to discuss information relevant to the Election. (Tr. @ 272:1-2) The Employer held similar meetings with route delivery employees ("RSRs") on two Saturday mornings, one in May and one in June. A

¹ Case No. 06-CA-097435

"round" of meetings is more specifically described as a group of meetings involving the same presentation by a management spokesperson, with anywhere from ten to twenty P & M employees in attendance. This approach to the holding of meetings was designed to keep the plant operating while the meetings were being held. (Tr. @ 393:3-9.) Ignoring some confusion on the part of one Union witness (Tr. @ 143:15 to 144:4,) it was understood by employees that attendance at all of the above-referenced meetings was voluntary. (Tr. @ 164: 5-10; Tr. @ 405:2-4.)

New Kensington General Manager Jim Lang attended all of the above-described weekday meetings with P & M employees and the two Saturday meetings with RSR employees. New Kensington Production Manager Kevin Stover attended all of the P & M meetings. Peter Kraft, the Employer's legal counsel, attended the first four rounds of meetings with P & M employees and the two Saturday morning meetings with RSR employees. The Employer's Senior Vice President, Michael Croatti, attended the 3rd and 4th round of meetings with P & M employees, and the second Saturday meeting with RSR employees.

During this same time period the Union distributed multiple flyers and also held meetings with bargaining unit employees. (See Employer's Exhibits 17A, B, and C, Union flyers; Tr. @ 292:11; Employer's Ex. 18, Union flyer, Tr. @ 418:18).

A secret ballot election was conducted on June 12, 2013 among employees in the agreed upon bargaining unit. During the voting, three ballots were challenged, one by each of the parties. The 70 to 69 tally of ballots in opposition to continued Union representation was not a determinative result due the number of challenged ballots.

On June 24, 2013 the Union filed timely Objections. During the month of July, 2013 a Hearing was held over the course of three days to allow the parties to submit evidence relevant to the challenged ballot of Michael Koscianski² as well as the five pending Objections. On August 28, 2013 the Hearing Officer issued her Report recommending that: (1) the challenged voter, Michael Koscianski, be considered eligible to participate in the election; (2) that Objections 1 and 2 relating to statements by the Employer's management about non-union retirement benefits be sustained; and (3) that Objections 3,4, and 5 be overruled. Notice of the September 11, 2013 due date for the filing of Exceptions to the Report was duly given.

III. <u>Discussion of Exceptions</u>

The Employer's Exceptions to the Report of the Hearing Officer ("Exceptions") filed herewith challenge her findings and recommendations associated with Objections 1 and 2. This Brief follows sequentially the enumerated Exceptions.

Exception #1. The Employer excepts the Hearing Officer's finding that the Employer engaged in objectionable conduct by making express or implied promises of non-union retirement benefits to employees to persuade them to vote against the Union in the June 13, 2013 decertification election. (Objections 1 and 2, H.O. Report p. 33.)

In the Board's most recent case discussing the subject of statements made by management prior to a decertification election about non-union benefits, in a split decision, the Board in *G & K Services, Inc.* 357 NLRB No 109 (2011) rejected a hearing

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² The resolution of the other two challenged ballots was achieved by Stipulation of the parties at the outset of the Hearing.

officer's decision overruling the objection that an employer had made implied promises to employees, explaining:

"Determining whether a statement is an implied promise involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statements as a promise."

Relying upon *TCI Cablevision* 329 NLRB 700 (1999), the hearing officer had found that the employer made accurate comparisons of union and non-union benefits, as well as truthfully described historical events in which decertifying employees at other locations owned by the employer received the non-union benefits. The Board disagreed, explaining:

"Although an employer may compare union and non-union benefits and make statements of historical fact, the Board has long held that even comparisons and statements of fact may, depending on their precise contents and context, nevertheless convey implied promises of benefits. See e.g. *Grede Plastics*, 219 NLRB 592, 593 (1975) (factually accurate letter contained implied promise); *Westminster Community Hospital, Inc.* 221 NLRB 185, 185 (1975), enfd. mem. 566 F.2d 1186 (9th Cir. 1977) (wage rate comparison contained implied promise)."

The Board's reference to "precise contents and context" is not one that neatly lends itself to analysis. But examining *G & K Services*, *supra*, as well as the two 1975 cases cited above, the Board's thinking can be understood by discussing the specific facts in each.

In G & K Services, supra the Board said that there was an improper "promise" of an enhanced benefit when, after accurately describing the company's non-union benefits in a letter (which the Board said was unobjectionable), in a later letter the employer talked about how the same non-union benefits were obtained by other workers of the

employer who had recently decertified a union at a different location. The Board found that disclaiming managerial statements in the second letter that no promises were being made was equivalent to a managerial "wink," and that the second letter instead clearly implied that the union workers would get the non-union benefits if they decertified. The Board also rejected the hearing officer's finding that the employer's written comments about the previous decertification at the other location was in response to employee questions, and stated that the employer "...volunteered unsolicited information, which supports a finding of an implied promise." Finally, the Board noted that there was no evidence that granting the non-union benefits to decertified employees was either required by law, the plan terms, or were otherwise described to employees as "automatic" because they applied to all unrepresented employees on a corporate-wide basis.

Applying these circumstances to the instant case, there were no letters sent by the Employer to employees. At all of the various meetings, there were no managerial comments about employees who had decertified at other locations and how they had received enhanced non-union benefits. Finally, the Record includes a significant amount of testimony that employees at New Kensington were aware that the Employer had one corporate-wide benefit program applicable to all unrepresented employees (Tr. @ 148:1-17, Tr. @ 148:24-25, Tr. @ 149:1; Tr. @ 164:11-16; Tr. @ 170: 9-12; Tr. @ 171:7-25, Tr. @ 171:1; Tr. @ 191:9-12; Tr. @ 196: 18-20; Tr. @ 197:8-10; Tr. @ 198:14-18; Tr.@ 242:23-25, Tr. @ 243:1-2; Tr. @ 273:21-25, Tr. @ 274:1-9; Tr. @ 368: 23-25, Tr. @ 369:1-3; Tr.@ 407:12-21). The Employer's Handbook indicates there is one benefits program for all unrepresented employees (Employer's Ex. 16B, Tr. @ 322:13-14) For

this reason, it would have been logical for employees to assume, without management making implied promises, that decertifying the Union would result in them being covered by the company's corporate-wide non-union retirement plans.

So the circumstances discussed in G & K Services which moved the Board to find that objectionable implied promises were made by the employer do not apply to the case at hand.

In *Grede Plastics, supra* three days before a decertification election the employer sent a letter to employees declaring that, compared to them, the employees in the employer's six non-union facilities received larger and more frequent wage increases, a better fringe benefit package, and better job security. The Board found this to be an implied promise of benefits because the letter contained the not so subtle threat that the employer would take a tough stand at negotiations if the employees did not decertify, and they would not enjoy comparable benefits to non-union employees if they voted to keep the union. The Board also found that because workers were immediately given the non-union benefits after the union lost the election, the employer's post-election granting of benefits had implications relevant to the implied promises.

The facts in *Grede Plastics, supra* are unlike those in the case at hand. There is no evidence of a last minute declaration by management of across-the-board superior economic circumstances and conditions which the New Kensington workers would never realize if they retained union representation. No benefits or changes were made after the election.

In Westminster Community Hospital, supra the employer held meetings with workers prior to a decertification election during which managerial representatives made comparisons of the union employees' compensation package with the superior wages and benefits of employees at various non-union hospitals owned by the employer's parent company. The Board found this unfavorable comparison to be an objectionable "disparagement" of the union in the context of one manager telling all of the workers that their package would have been better but for the union, coupled with repeated threats by management's counsel that if the union stayed he would negotiate a "lousy" contract in the future. The Board also found that granting the workers a wage increase immediately after the vote, in spite of pending objections, was tantamount to an improper reward "...and a fulfillment of earlier unlawful promises."

It is important to note, in the spirit of supplying "context," no disparaging comments or criticisms about the Union's bargaining efforts were made in the instant case. In fact, the opposite is true. The Employer's Production Manager, Kevin Stover, provided the following uncontradicted testimony on this subject:

BY MR. KRAFT:

- Q. Mr. Stover, in mid-April at meetings that were held with production, maintenance, and mechanical employees, do you remember me saying anything about Union officials?
- A. Yes you did.
- Q. What did I say?
- A. You actually praised the Union officials that we were working with, explained that they had been very good to work with, Mr. Woodward... one of the best Bas

that we've ever had, very easy to work with, very professional." (Tr @ 409:19-25; Tr @ 410:1-5).

There is absolutely no evidence in the instant matter that statements were made by management indicating that the employees would suffer the consequences of managerial retribution, or a "lousy" future contract, or any other kind adverse punishment, if the employees chose to retain union representation. And, to reiterate what was stated above, no changes were made to employees' compensation after the election.

Continuing to discuss "precise content and context" relative to the allegedly objectionable remarks of Employer's management concerning implied promises, there are additional points of significance relevant to the Board's scrutiny of this subject.

First, the Employer's discussions about non-union retirement benefits were entirely in response to employees' questions. At the first round of meetings with employees, held in mid-April, the Employer's representatives said that before the Employer was going to discuss specifics about the vote, employees should submit questions. (Tr. @ 392: 20-25 thru Tr. @ 394:1-5;) The Employer posted an invitation for employees to submit questions about the vote (See Employer's Ex 8.) The Record is replete with testimony that the employees raised many questions about the Employer's non-union retirement benefits in the weeks prior to the election. (Tr. @ 167:14-16; Tr. @ 168: 10-17; Tr. @ 124: 1-12; Tr. @ 131:3-13; Tr. @ 262:17-21; Tr. @ 281:24-25; Tr. @ 282:1-3; Tr. @ 284:2-8; Tr. @ 330:3-5; Tr. @ 395:5-6; Tr. @ 396:9-11.) The Board's issue in *G & K Services* about management discussing information not asked about by employees is not relevant to the instant case. The Board has stated that benefit comparisons in response to employee requests are less likely to be considered an implied promise of benefits.

See Suburban Journals of Greater St. Louis LLC 343 NLRB 157 (2004) citing Crown Electrical Contracting, Inc. 338 NLRB No. 36 (2002), slip op. at 2 fn 4.

Second, the employers' statements in the above-discussed cases where the Board made findings of objectionable conduct management made mention of higher wages or features of fringe benefit plans that were <u>unquestionably</u> better than the union benefits. In *G & K Services* the non-union personnel had family health insurance coverage, the union personnel did not. In both *Grede Plastics* and *Westminster Community Hospital*, the employers' statements mentioned specific, unequivocal wage increase and fringe benefit advantages. These enhancements could not be identified as anything but a "carrot" designed to encourage workers to vote to decertify the union.

This is not true in the instant case. There was widespread and aggressively asserted opinions by employees at all of the various pre-election meetings that the Employer's non-union profit sharing and 401(k) plans were <u>not</u> as good a retirement program as the Union's pension. In this regard, most of the Union witnesses, and all of the management witnesses, testified that numerous and recurring highly critical comments about the Company's retirement benefits were made by several employees throughout the various employee meetings, including the following:

- The Union pension is better because it is contractually guaranteed and the Company's retirement plans are not. (Tr. @ 331:13-16, Tr. @ 398:6-12.)
- The Union pension is a better deal for more senior, longer tenured employees, who will not benefit from either profit-sharing or 401(k) plans.(Tr. @ 235:23 to 236:7; Tr. @ 331:20-23; Tr. @ 301: 20-23.)

- The Company's plans are vulnerable to the hazards of a risky stock market. After the near crash of 2008, the Union pension is a safer choice. (Tr. @ 331:17-19; Tr. @ 137:4-7.)
- Employees here don't make enough money to contribute to a 401(k) plan (Tr. 332:6-7; Tr
 @ 136:22-24.)

The production employee the Hearing Officer found to be the "most credible," Val Jean Barnett, after pursuing questions she had asked of Senior Vice President Michael Croatti about how the Employer's profit sharing plan worked, declared at the meeting, in front of other bargaining unit employees, that the Company's profit sharing is "... not going to help me any because I'm retiring in 3½ years and the profit sharing is not going to help my finances." (Tr. @ 159:10-12). According to Croatti, Barnett responded to his explanation by saying that the annual profit sharing amount "isn't much money," adding "I'd rather have my pension." (Tr. @ 339:4) Barnett went on to state at the same meeting, in front of the other employees "... I would rather pay the Union dues than have a 401(k) plan because it does not help me any." (Tr. @ 159: 14-15). As the meeting with Croatti ended Barnett stated: "Well you know how I'm going to vote," and the other three employees at the meeting all nodded their heads in agreement, saying "we're going to keep our union." (Tr. @ 339: 7-10.)

With so many bargaining unit employees openly preferring the Union pension over the Employer's non-union retirement benefits, the pre-election dialogue over retirement benefits reflects that the instant matter is substantially different than those cases where the Board found that promises of tangible enhancements were made by management. None of the Union witnesses who testified spoke favorably about the Employer's non-union plans. It was not proven

by the Union that the Employer's non-union retirement benefits were a genuine "enticement" necessarily motivating bargaining unit employees to want to decertify the Union.

The Employer contends that its statements and conduct were in sync with past decisions of the Board finding that no objectionable statements were made. The long-time standard applied by the Board about an employer's pre-election statements concerning non-union benefits was articulated in <u>UniFirst Corp.</u> 346 NLRB 591 (2006), in which the Board said:

"Under extant Board law, employers may make truthful statements to employees concerning benefits available to their represented and un-represented employees, may compare wages and benefits at their unionized and nonunionized facilities, and may offer an opinion, based on such comparisons, that employees would be better off without a union (citing *TCI Cablevision*, *supra*)"

In summary, with respect to the Union's Objection about the Employer's management making pre-election, unlawful implied promises of non-union retirement benefits to employees, taking into account content and context (which should include consideration of the Employer's other Exceptions herein) the Record does not justify the Hearing Officer's finding that such objectionable statements were made.

Exception #2 The Employer excepts the Hearing Officer's finding that the "disclaimers" made by the Employer's management, (including recurring statements that the Company's non-union retirement benefits were obtainable by employees through collective bargaining,) were inadequate and/or immaterial to properly and lawfully put in proper context their statements describing details of the Employer's non-union retirement benefits. (Objections 1 and 2, H.O. Report, p. 33)

The disclaimers made by the Employer's management advising employees that promises were not being made went well beyond what the Board has cited with approval in other cases. See, for example, *Langdale Forest Products Co* 335 NLRB No. 51 (2001), and *TCI Cablevision*, *supra*. The Union's two "most credible" witnesses, Val Jean Barnett and George Bowman, supplied detailed testimony in this regard. Ms Barnett's testimony on the Employer's "disclaimers" is as follows:

Q. [by Mr.Kraft] – do you remember me open the meeting by saying I need to make three comments very clearly to everyone?

A. Yeah. I don't remember.

Q. And did I say, first, I'm going to talk about the Company's non-union benefits for corporate-wide benefits, and by talking about them, I'm not saying you can't get them through Union negotiations? I made that very clear, right?

A. Yes, you did.

Q. And the second thing I said was none of these benefits are guaranteed. The handbook says so, correct?

A. Yes.

Q. Okay. And the third thing I believe was I can't promise you anything. I can't make any guarantees. I can't promise you anything. I'm not offering you anything, right?

A. Yes.

Q. I wasn't the only one who said those things, right? Mr. Lang said the same things, correct?

A. Yes. (Tr. @ 170:4-23)

George Bowman testified similarly about the "disclaimers" made by management representatives at the outset of the meeting he attended on Saturday, May 18, 2013:

³ Hearing Officer's Report, p.31

Q. [by Mr. Kraft] Do you remember at the outset of that meeting I made some clarifying remarks about the things I had to clarify before talking about the subject of decertification to all of you?

A. Yes.

Q. I said three things, didn't I? I'll give you the first one. I said even though I'm about to talk about the Company's corporate-wide national benefits program, that does not mean you can't get them through a bargaining process. I said that right?

A. Yes.

Q. All right. The second thing I said was that the Company's benefits are not guaranteed. It says it in the handbook?

A. That I remember, Yes.

Q. And the third thing I said was I can't promise you anything. I can't make – I can't make promises. I'm not trying to == I'm not allowed to promise you anything, right?

A. Correct.

Q. And I said I'm not offering you anything here?

A. Correct. (Tr. @ 191:2-22).

The second of the above-described disclaimers is substantially different than what management has said in other cases to caution employees. By mentioning that the Employer's non-union benefits are not "guaranteed," and by referring employees to the Employer's handbook, the Employer made known the reservation of rights language common to such employee writings:

"Unifirst reserves the right, in its sole and absolute discretion, to amend, modify or terminate, in whole or in part, any or all of the benefit plans described herein." (Employer's Ex. 16A, UniFirst Handbook @ the page prior to D-3: Tr. @ 322:13-14).

The Union's leaflets identified this same issue with considerable emphasis (See, for example, Employer Ex.17B, Union Flyer) Therefore, when management said at the meetings with

employees that the Company's retirement plans were not "guaranteed," employees understood this to mean that they could not be certain about any aspect of the Employer's retirement plans.

Finally, with respect to those Union witnesses who could not remember all of the occasions when all of the above-quoted disclaimers were made, they universally testified that even if they did not recall them, it was possible they were made. (Tr. @ 171:4-4; Tr. @ 234:1-25, Tr. @ 235:1; Tr. @ 246:19-25, Tr. @ 247:1-14). Since the management witnesses all testified unequivocally about repeatedly reminding employees of all three disclaimers, (Tr. @ 295: 23-25, Tr. @ 296:1-2; Tr. @ 262: 11-16; Tr. @ 394:13-25, Tr. @ 395:1-12; Tr. @ 330:11-16; Tr @) 333:21-25; Tr. @ 339:1-5: Tr. @ 346: 6-13) the Union did not carry the burden of proof on this subject.

In short, there is prolific testimony about the number of times managerial representatives kept reminding employees about the limited context in which the Company's retirement benefits were being discussed. This makes sense in light of the remarks of Employer witnesses elicited upon cross-examination about the time spent during pre-meeting planning that included training by legal counsel about what kinds of statements management should make and not make to abide by legal requirements (Tr. @ 362:16-17; (Tr. @ 410:22 to 411:2.

In addition to the substantial evidence verifying that the Employer's disclaimers were both adequate and material, there is reliable evidence that when responding to employee questions about retirement benefits or any other subject, the Employer was not "winking" at the employees by ignoring the various disclaimers referred to in the previous paragraphs. The third

"most credible" Union witness, Denise Waterloo, ⁴ a thirty year production employee, testified about the vagueness in which management discussed benefits and the outcome of the vote. When asked what retirement plans management told her she would be eligible to receive if the Union lost the election, Waterloo stated: "They talked about it, but they didn't really say that they would give it to us, so they had us, like, hanging." (Tr. @ 213:16-17.) Furthermore, Waterloo confirmed that management officials were vigilant in refusing to answer employee questions which could be construed as making implied promises. Waterloo, who only attended one meeting—the 3rd round of meetings led by Croatti—said she kept trying to get management officials to explain what they were "offering," but they kept refraining from answering her questions: "I don't remember what term you used, but every question I asked you said you couldn't answer because of the way I was putting it in the sentence." (Tr. @ 216: 5-7.) Other Union witnesses likewise testified that management was often unresponsive to employee questions. (Tr. @ 122: 23-25.)

Exception #3 The Employer excepts the Hearing Officer's failure, in her evidentiary conclusions, to take into account the degree to which Union witnesses' testimony was the product of a pattern of leading questions by Union counsel on the subject of their understanding of what managerial speakers said about the Employer's non-union retirement benefits.

When discussing the quality of testimony supplied by witnesses at a hearing the Board will occasionally comment on the reliability of information elicited through

⁴ Hearing Officer's Report, p. 32

leading questions. See, for example, *Chino Valley Medical Center* 359 NLRB No. 111 (2013); *The Sheraton Anchorage* 359 NLRB No. 95 (2013); *G4S Regulated Security Solutions* 358 NLRB No. 160 (2012); *Springfield Terrace LTD* 355 NLRB 937 (2010); *Roadway Express Inc* 355 NLRB 197 (2010); and *Marshall Engineered Products Company LLC* 351 NLRB 767 (2007). The Board does not necessarily dismiss such testimony. Where the testimony is given some credence, it is nonetheless given a reduced value in the Board's analyzing the merits of a case.

In the instant matter, all of the Union's production employee witnesses were asked leading questions by Union counsel about what they understood management speakers to mean when talking about the Company's non-union retirement benefits. (Tr @ 121: 22-25, Tr @ 122: 1-2; Tr @ 139: 16-18, Tr @ 140: 8-14; Tr @ 157, 7-12; Tr @ 213: 2-8, Tr @ 213:11-15. The cited pages reflects that attempts were repeatedly made to rein in Union counsel by both the Employer's counsel through objections and by the Hearing Officer; however, such efforts proved unavailing. On the most pivotal subject being contested by the parties, for the Hearing Officer to ignore such an obvious pattern rather than declare it to be a meaningful factor in crediting the testimony of naïve and unsophisticated plant workers is a meaningful flaw in the Hearing Officer's treatment of employees' "understanding" about what they understood management to be saying at pre-election meetings. The Hearing Officer found that all of the Union witnesses "understood" the same message-- they were going to get the Employer's non-union retirement benefits upon voting the union out. The context of this assumption is critically important. When Val Jean Barnett, the "most credible" Union witness, was cross-examined about her June 7, 2013 conversation with Michael Croatti (more particularly described earlier in this Brief) discussing how the Employer's non-union profit sharing plan works, Barnett's understanding of what Croatti told her about the employer's retirement benefits does not contain any objectionable inference of an implied promise:

Q. "Right. As far as when is you say 'the way I took it,' Michael, Mr. Croatti was saying this is what the non-union benefits are?"

A. "Uh huh."

Q. "He contrasted them with the Union benefits, and when you say 'that's the way I took it,' aren't you saying I made an assumption that if the Union wasn't there I was going to get the non-Union benefits?"

The Employer is not saying here that the Union witnesses were dishonest when they testified on direct examination. But by relying so heavily on leading questions to make a Record about implied promises, the Hearing Officer erred. The Board should take this into account when considering the Hearing Officer's findings and recommendations.

Exception #4 The Employer excepts the Hearing Officer's finding that the Employer committed objectionable conduct by allegedly telling employees that the only way for them to obtain non-union retirement benefits was to decertify the Union. (Objections 1 and 2, H.O. Report p. 33).

Specifically, the Hearing Officer stated:

"...[T]he Union witnesses...all heard and understood the Employer's message to be that the employees should get rid of the Union, put their dues money into a 401(k) plan, and reap the benefits of 401(k) and profit sharing plans, benefits

currently being enjoyed by the non-union employees of the Employer and only available to them if they became non-union." (emphasis supplied.)

The Hearing Officer later repeated this same assertion as an exculpatory finding:

"...I further find that the Employer's statements planted the seeds in the minds of the employees that their attainment of a 401(k) plan, profit sharing, and frozen pensions was directly and solely based on their rejection of the Union. (emphasis supplied)

In a related discussion about the sufficiency of employer disclaimers, this subject has been discussed in detail in Exception 2 of this Brief, so redundant commentary here is unnecessary. The above-cited findings are not borne out by the testimonial evidence. No Union witness said that a management representative told them, at any time, that the <u>only</u> way they could obtain non-union retirement benefits was to decertify the Union. The management witnesses all testified unequivocally that they said the exact opposite. (Tr. @ 333:5-8; see also transcript cites of management testimony in the first paragraph on pages 16-17 of the Brief).

The Board has plainly recognized the distinction between management talking about nonunion benefits as contrasted with a discernible affirmation that such benefits are <u>only</u> available if the employees reject union representation. In *UniFirst Corporation, supra* the Board stated:

"...[We observe that the General Counsel did not establish the facts the Board found so critical in *TCI Cablevision*: that the Respondent told employees that the *only* way could get certain benefits was to decertify the Union, or that the Respondent said it would never agree with the union to have certain benefits."

The Hearing Officer's finding that the Employer's management somehow implied to employees that the Employer's non-union retirement benefits were beyond their reach in any context is completely unsubstantiated by the Record in this matter.

Exception #5 The Employer excepts the Hearing Officer's finding that the Employer

committed objectionable conduct by telling employees the monies in their pension fund would be frozen if the Union ceased representing them. (Objections 1 and 2, H.O. Report p. 33.) The Hearing Officer specifically stated:

"...[T]he credited testimony of all the Union witnesses is that the Employer expressly promised bargaining unit employees a 401(k) plan and profit sharing and that their pensions would be frozen if the Union was decertified." (emphasis supplied)

The Hearing Officer is linking alleged managerial promises about the non-union retirement benefits with an entirely different subject, namely, pension funds and ERISA compliance. Prior to the election Employees predictably and understandably asked what would happen to their pension plan if the Union no longer represented them.⁵ The Employer provided the legally correct response. (Tr. @ 172:2-11; Tr. @ 285:3-4). The pension fund in the parties' labor contract is unique to the Employer's New Kensington employees. It is a single-employer defined benefit plan. This pension fund was created only as a result of the collective bargaining process. If the Union is decertified, the underlying reason for continuing to have the pension fund will be erased. Under such circumstances, ERISA laws govern the Employer's obligations relative to maintenance of fund assets and how they must be administered.⁶ Since management's articulation of legal requirements concerning how the employees' pension could be affected by decertification, such statements were made in good faith, with no intent to imply promises of benefits. Such statements were incorrectly characterized by the Hearing Officer as objectionable.

⁵ See Record cites in the last paragraph of this Brief.

⁶ The Employer would ask the Board to take judicial notice generally of ERISA laws and regulations covering this subject, and specifically 29 USC §1322 and 29 USC §1343(c) with respect to the single –employer pension fund in the instant case. The Employer notes that this subject was not raised in the Objections, so the Employer should not be penalized for not coming forth with specific evidence at the Hearing regarding ERISA requirements.

IV. Conclusion

Based on the foregoing, the Employer respectfully that Objections 1 and 2 to be overruled, that and the Regional Director take appropriate action consistent with the recommendations of the Hearing Officer on the challenged ballots necessary to confirm the tally of ballots and validate the Election results.

Dated this 11th day of September, 2013 in Portland, Maine.

Respectfully submitted,

/s/ Peter R. Kraft

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via the U.S Postal Service, postage pre-paid, to Howard Grossinger, Esq., Grossinger, Gordon, Vatz, LLP, 100 Law & Finance Building, 429 Fourth Avenue, Pittsburgh, Pennsylvania 15219 this 11th of September, 2013.

_______/s/ Peter R.Kraft
Peter R. Kraft, Esq.